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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11	MARQUETH WILSON,)	Case No.: 1:18-cv-1245- LJO - JLT
12	Plaintiff,)	
13	v.)	ORDER GRANTING PLAINTIFF’S MOTION TO
14	BEHR PAINT, et al.)	PROCEED IN FORMA PAUPERIS
15	Defendants.)	ORDER DISMISSING THE COMPLAINT WITH
16)	LEAVE TO AMEND

17 Marqueth Wilson seeks to proceed with an action against Behr Paint and Masco Corporation,
18 asserting the defendants mislabeled paint cans purchased by Plaintiff, and are liable for violations of
19 Texas law. Pending before the Court are the complaint and a request to proceed *in forma pauperis*.
20 (Docs. 1, 2) For the reasons set forth below, his application to proceed *in forma pauperis* is
21 **GRANTED**. However, Plaintiff fails to allege facts supporting a conclusion that the amount in
22 controversy exceeds \$75,000 and that this Court has diversity jurisdiction. Therefore, the Plaintiff’s
23 complaint is **DISMISSED** with leave to amend.

24 **I. Motion to Proceed In Forma Pauperis**

25 The Court may authorize the commencement of an action without prepayment of fees “by a
26 person who submits an affidavit that includes a statement of all assets such person . . . possesses [and]
27 that the person is unable to pay such fees or give security therefor.” 28 U.S.C. § 1915(a). The Court
28 reviewed the financial status affidavit (Doc. 2), and finds the requirements of 28 U.S.C. § 1915(a) are

1 satisfied. Therefore, Plaintiff's request to proceed *in forma pauperis* is **GRANTED**.

2 **II. Screening Requirement**

3 When an individual seeks to proceed *in forma pauperis*, the Court is required to review the
4 complaint and shall dismiss a complaint, or portion of the complaint, if it is "frivolous, malicious or
5 fails to state a claim upon which relief may be granted; or . . . seeks monetary relief from a defendant
6 who is immune from such relief." 28 U.S.C. § 1915A(b); 28 U.S.C. § 1915(e)(2). A plaintiff's claim is
7 frivolous "when the facts alleged rise to the level of the irrational or the wholly incredible, whether or
8 not there are judicially noticeable facts available to contradict them." *Denton v. Hernandez*, 504 U.S.
9 25, 32-33 (1992).

10 **III. Pleading Requirements**

11 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A
12 complaint must include a statement affirming the court's jurisdiction, "a short and plain statement of
13 the claim showing the pleader is entitled to relief; and . . . a demand for the relief sought, which may
14 include relief in the alternative or different types of relief." Fed. R. Civ. P. 8(a). The Federal Rules
15 adopt a flexible pleading policy, and *pro se* pleadings are held to "less stringent standards" than those
16 drafted by attorneys. *Haines v. Kerner*, 404 U.S. 519, 521-21 (1972).

17 A complaint must state the elements of the plaintiff's claim in a plain and succinct manner.
18 *Jones v. Cmty Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984). The purpose of a complaint
19 is to give the defendant fair notice of the claims against him, and the grounds upon which the
20 complaint stands. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). The Supreme Court noted,

21 Rule 8 does not require detailed factual allegations, but it demands more than an
22 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers
23 labels and conclusions or a formulaic recitation of the elements of a cause of action will
not do. Nor does a complaint suffice if it tenders naked assertions devoid of further
factual enhancement.

24 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

25 Conclusory and vague allegations do not support a cause of action. *Ivey v. Board of Regents*, 673 F.2d
26 266, 268 (9th Cir. 1982). The Court clarified further,

27 [A] complaint must contain sufficient factual matter, accepted as true, to "state a claim
28 to relief that is plausible on its face." [Citation]. A claim has facial plausibility when
the plaintiff pleads factual content that allows the court to draw the reasonable
inference that the defendant is liable for the misconduct alleged. [Citation]. The

1 plausibility standard is not akin to a “probability requirement,” but it asks for more than
 2 a sheer possibility that a defendant has acted unlawfully. [Citation]. Where a complaint
 3 pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of
 4 the line between possibility and plausibility of ‘entitlement to relief.’

5 *Iqbal*, 556 U.S. at 678 (citations omitted). If factual allegations are well-pled, a court should assume
 6 their truth and determine whether the facts would make the plaintiff entitled to relief; conclusions in the
 7 pleading are not entitled to the same assumption of truth. *Id.*

8 **IV. Factual Allegations**

9 Plaintiff asserts that in October 2016, he owned a business called “Walls by Wilson.” (Doc. 1 at
 10 2) He purchased “at least twelve (12) gallons of white, untinted paint in two five-gallon containers and
 11 two gallon containers along with other paint-related material” at a Home Depot store in Balch Springs,
 12 Texas. (*Id.*) According to Plaintiff, he “indicated that he desired to purchase interior semi-gloss paint.”
 13 (*Id.*) However, after Plaintiff “spray[ed] more than ten gallons of paint in the interior portion of a
 14 residential property,” he discovered “as the paint dried...that the paint did not have any sheen
 15 whatsoever.” (*Id.*) (emphasis omitted). He reports that he examined the paint and containers, and found
 16 “the material was indeed flat paint and the label purported Behr’s material to be interior semi-gloss
 17 paint.” (*Id.*)

18 He reports upon discovering the paint was flat, he “immediately telephoned The Home Depot
 19 and The Home Depot instructed Plaintiff to bring the paint back to the store so that it could be
 20 inspected.” (Doc. 1 at 2) He then “explained that he had sprayed over ten gallons in the home in which
 21 he was contracted with to paint, and The Home Depot instructed Plaintiff to bring back whatever paint
 22 he had remaining with the lids of the containers.” (*Id.*) Plaintiff asserts he “complied with Home
 23 Depot’s instructions,” and employees who examined the remaining paint “conclusively determined that
 24 the paint in the five-gallon containers was indeed flat paint in a mislabeled container.” (*Id.*)

25 According to Plaintiff, the Home Depot employees informed him “that the product[s] of Behr
 26 Paint were the sole responsibility of Behr Paint/Masco Corporation.” (Doc. 1 at 2) In addition, he was
 27 informed that “Home Depot would contact Behr to see what steps they were willing to take to rectify
 28 the situation.” (*Id.*) Plaintiff reports that he was also “advised that Behr Paint would likely schedule a
 date in about ‘two weeks’ to view the residential property.” (*Id.* at 3) Plaintiff informed the Home

1 Depot employees that he and Walls by Wilson [were] solely responsible for labor and materials and
 2 that he would have to lose additional time repainting the residential property.” (*Id.* at 2) He also
 3 informed them that “he was bound to a deadline and was consistently losing money as a direct result of
 4 Behr’s product.” (*Id.*)

5 He reports Behr Paint and Masco Corporation did not “contact[] Plaintiff to rectify this matter.”
 6 (Doc. 1 at 3) Plaintiff asserts he made an offer to Behr Paint to resolve it under the Texas Deceptive
 7 Trade Practices- Consumer Protection Act, but the company “did not, nor has not responded.” (*Id.*)

8 **V. Discussion and Analysis**

9 **A. Jurisdiction**

10 Plaintiff raises only claims arising under the state law of Texas, and does not invoke this
 11 Court’s subject matter jurisdiction. (*See* Doc. 1 at 2-4) He asserts, “The United States District Court
 12 has original jurisdiction over this action based on a complete diversity amongst and between the
 13 parties in that Marqueth Wilson and Behr Paint and Masco Corporation.” (Doc. 1 at 1) For the Court
 14 to have diversity jurisdiction, there must be diverse citizenship of all parties, and the amount in
 15 controversy must exceed the sum or value of \$75,000. 28 U.S.C. § 1332(a); *see also* *Bautista v. Pan*
 16 *American World Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987).

17 **1. Citizenship**

18 According to Plaintiff, he is “a citizen of the state of Texas,” while “Behr Paint and Masco
 19 Corporation is a corporation incorporated under the laws of the State of California with its principal
 20 place of business in Santa Ana, California or another state outside of Texas.” (Doc. 1 at 1) Thus,
 21 Plaintiff contends the parties are diverse.

22 **2. Amount in controversy**

23 A plaintiff has a burden to plead facts supporting a conclusion that the amount in controversy
 24 is satisfied. The Ninth Circuit explained, “[t]he party seeking to invoke the district court’s diversity
 25 jurisdiction always bears the burden of both pleading and proving diversity jurisdiction.” *Rainero v.*
 26 *Archon Corp.*, 844 F.3d 832, 840 (9th Cir. 2016) (quoting *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d
 27 606, 613-14 (9th Cir. 2016)); *see also* *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th
 28 Cir. 1996) (indicating that if the court’s jurisdiction is challenged, the plaintiff has a burden to prove

1 by a preponderance of the evidence that the amount in controversy exceeds \$75,000). At the pleading
2 stage, a conclusory allegation that the amount in controversy exceeds \$75,000 does not satisfy the
3 plaintiff's burden. *See Rainero*, 844 F.3d at 840.

4 Plaintiff seeks \$50,000 for violations of Texas' Deceptive Trade Practices Act; \$20,000 for his
5 product liability claim; \$30,000 for negligence; \$25,000 in exemplary damages; and "\$5,000 for actual
6 damages." (Doc. 1 at 4) Notably, there is no information regarding whether Plaintiff asserts the \$5,000
7 is solely from his purchase of the paint or includes lost profits to his business. Indeed, the Court is
8 hard-pressed to believe the cost of the 10 gallons of paint used exceeded \$500.

9 In addition, there are no facts supporting the damage amounts identified by Plaintiff. For
10 example, though Plaintiff seeks \$50,000 under the Deceptive Trade Practices Act ("DTPA"), he fails
11 to allege facts that support a conclusion an award of this amount is possible under the DTPA. The
12 DTPA indicates that a plaintiff may recover actual economic damages and treble damages where the
13 defendant acted knowingly. *See* Tex. Bus. & Com. Code §17.50. Thus, based on the actual damages
14 amount of \$5,000.00 identified by Plaintiff, he could recover at most \$15,000 for the alleged violation
15 of the DTPA. *See id.* Likewise, there are no factual allegations that Behr acted in such a way as to
16 justify exemplary damages¹ or that his negligence cause of action would give rise to more damages
17 than the claimed actual damages.

18 Plaintiff's failure to support the requested damages raises the inference that the Court's
19 diversity jurisdiction is not implicated. Accordingly, Plaintiff will be given leave to file an amended
20 complaint that includes facts supporting the damage requests and addressing the matter of this Court's
21 jurisdiction.

22 **B. Venue**

23 The Ninth Circuit determined that a court may raise the issue of improper venue *sua sponte*.
24 *See Costlow v. Weeks*, 790 F.2d 1486, 1488 (9th Cir. 1986) ("the district court had the authority to raise
25 the issue of defective venue on its own motion" where there has not been a responsive pleading).
26 Based upon the facts alleged, it appears that venue is improper.

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¹ The mere fact that Behr did not accept the plaintiff's settlement offer, is insufficient.

1 When the Court's diversity jurisdiction is invoked, the proper venue is in:

2 (1) a judicial district in which any defendant resides, if all defendants are residents of
3 the State in which the district is located;

4 (2) a judicial district in which a substantial part of the events or omissions giving rise
5 to the claim occurred, or a substantial part of property that is the subject of the action is
6 situated; or

7 (3) if there is no district in which an action may otherwise be brought as provided in
8 this section, any judicial district in which any defendant is subject to the court's
9 personal jurisdiction with respect to such action.

10 28 U.S.C. § 1391(a). In a diversity action, venue is proper in any district where the defendant resides
11 or the incident giving rise to the claims occurred.

12 In the complaint, Plaintiff asserts he purchased the paint in Texas and the headquarters for the
13 defendant is in Santa Ana, which lies within the Central District of California. Plaintiff also alleges
14 Behr Paint has an address located at 510 14th Street, Suite 200, Bakersfield, California. However, this
15 is not a proper address for the entity² and Bakersfield, California is not within the Central District of
16 California. Thus, it does not appear this Court is the proper venue for his claims under 28 U.S.C. §
17 1391. In the amended complaint, Plaintiff SHALL address the matter of venue, and whether his claims
18 should be dismissed or transferred to either the Central District of California or Northern District of
19 Texas.

20 **VI. Conclusion and Order**

21 Plaintiff fails to allege facts supporting a conclusion that this Court has diversity jurisdiction,
22 or that the Eastern District of California is the proper venue for his claims. Given the lack of
23 information, the Court will grant Plaintiff leave to amend to address the Court's jurisdiction and
24 venue. *See Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987); *see also Lopez*, 203 F.3d at 1128
25 (dismissal of a *pro se* complaint without leave to amend for failure to state a claim is proper only
26 where it is obvious that an opportunity to amend would be futile). The amended complaint must bear
27 the docket number assigned this case and must be entitled "First Amended Complaint."

28 ² Fed. R. Evid. 201 permits a court to take judicial notice of any facts that "is generally known within the trial
court's territorial jurisdiction" or that "can accurately and readily determined from sources whose accuracy cannot
reasonably be questioned." Accordingly, the court takes judicial notice of the fact that the address identified by Plaintiff in
Bakersfield, California is not an office for Behr Paint.

1 Plaintiff is advised that an amended complaint supersedes the original complaint. *Forsyth v.*
2 *Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).
3 In addition, the amended complaint must be “complete in itself without reference to the prior or
4 superseded pleading.” Local Rule 220. Once Plaintiff files an amended complaint, the original
5 pleading no longer serves any function in the case. The amended complaint must bear the docket
6 number assigned this case and must be labeled “First Amended Complaint.” Finally, Plaintiff is
7 warned that “[a]ll causes of action alleged in an original complaint which are not alleged in an
8 amended complaint are waived.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1986) (citing *London v.*
9 *Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).

10 Based upon the foregoing, the Court **ORDERS**:

- 11 1. Plaintiff’s request to proceed *in forma pauperis* (Doc. 2) is **GRANTED**;
- 12 2. Plaintiff’s Complaint is **DISMISSED** with leave to amend; and
- 13 3. Within thirty days from the date of service of this order, Plaintiff **SHALL** file a First
14 Amended Complaint.

15 **If Plaintiff fails to comply with this order to file a First Amended Complaint, the action may be**
16 **dismissed for failure to prosecute and failure to obey the Court’s order.**

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18 IT IS SO ORDERED.

19 Dated: October 22, 2018

/s/ Jennifer L. Thurston
20 UNITED STATES MAGISTRATE JUDGE
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